Supreme Court, U.S.
FILED
MAY 9 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	
Opinion Below	4
Jurisdiction	5
Questions Presented For Review	5
Constitutional Provisions	7
STATEMENT OF THE CASE	8
VESTED PROPERTY RIGHTS CANNOT - CONSISTENT WITH DUE PROCESS OF LAW - BE SWEPT ASIDE BY SUDDEN CHANGES IN THE LAW THAT (IN THE WORDS OF THE TRIAL JUDGE) "TOOK THE WHOLE [LEGAL] PROFESSION [BY SURPRISE]"	12
GION-DIETZ, BY RADICALLY AND RETROACTIVELY CHANGING THE LAW OF "IMPLIED DEDICATION", UNCONSTITUTIONALLY IMPARIED THE OBLIGATION OF CONTRACTS, IN CONFLICT WITH DECISIONS OF THIS COURT	22

TABLE OF AUTHORITIES

	Page
CONCLUSION	25
APPENDIX A - OPINION Court of of Appeal, Dated Dec. 16, 1977	
APPENDIX B - PETITION FOR REHEARING DENIED, Dated JAN 3- 1978	
APPENDIX C - ORDER, HEARING DENIED, Dated FEB 9 1978	
APPENDIX D - NOTICE OF INTENDED DECISION, Dated 8/1/74	
APPENDIX E - JUDGMENT QUIETING TITLE TO REAL PROPERTY, Dated, 1/13/75	

TABLE OF AUTHORITIES

Cases

	Page
Chicago, B. & Q. R. Co. v. Chicago (1897) 166 U.S. 266	12
City of San Diego v. Hall (1919) 180 Cal. 165	20
Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162 465 P.2d 50	Passim
F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436	19, 20
Hughes v. Washington (1967) 389 U.S. 290	12, 13, 16, 20
Manhattan Beach v. Cortelyou (1938) 10 Cal.2d 653	20
Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544	12, 24, 25
Sotomura v. Co. of Hawaii (D.H (D. Hawaii 1975) 402 F.Supp. 95	15. 16

	Page
Stovall v. Denno (1967) 388 U.S. 293	21
Whiteman v. City of San Diego (1920) 184 Cal. 163	20

Statute

28 U.S.C. § 1257(3)	5

Constitution

United States Constitution	
Article 1, §10	6, 7, 11, 23
Fifth Amendment	7, 11
Fourteenth Amendment	7, 11

Texts

The Supreme Court of California 1969-1970 (1971) 59 Calif. L. Rev. 30, 231-232	18
This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches (1971) 44 S. Cal. L. Rev. 1092, 1093	18, 20

	Page
Public or Private Ownership of Beaches: An Alternative to Implied Dedication (1971) 18 U.C.L.A. L. Rev. 795, 802	18
Lascher, Tips For the Overburdened Reader (1971) 46 Cal. St. B. J. 13, 16	17
Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? (1972) 47 Cal. St. B. J. 415	17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

No. _____

CATHERINE A. DAUGHTERY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

Petitioner Catherine A. Daugherty respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, Second Appellate District, Division Four, in the case at bench and, upon such review, the decision be reversed.

This case represents a particularly cruel illustration of the problem which can accompany the use of extreme "solutions"

to problems perceived as "environmental" in nature.

One can endorse the general public goal of preservation of coastal resources and provision of public access to the shore. Such agreement, however, does not lead to approval of the means chosen by the California courts to accomplish it.

Confiscation of Mrs. Daugherty's property based on events which occurred decades ago, and under legal rules which gave no warning of the confiscation which would occur decades later, is the product of this case's movement towards that goal. Uncounted others occupy the same unfortunate situation.

The general solution devised by the California Supreme Court in its decision in Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 84 Cal.Rptr. 162, 465 P.2d 50,[1/] was a radical and unexpected expansion of the doctrine of "implied dedication" based upon a series of fictional presumptions.

1/ The Gion case was consolidated with Dietz v. King and is sometimes referred to as the Gion-Dietz decision.

The Court presumed that long use of property by "the public" meant that the owner knew of the use being made and acquiesced in it (2 Cal.3d at 38, 84 Cal.Rptr. at 167, 465 P.2d at 55). It further presumed that "public use" for five years meant that the use was adverse (2 Cal.3d at 39, 84 Cal.Rptr. at 168, 465 P.2d at 56).[2/] And it further presumed that this presumably adverse use in which the owner presumably acquiesced meant that the owner presumably intended to dedicate his property to "the public" (2 Cal.3d at 38-39, 84 Cal.Rptr. at 167-168, 465 P.2d at 55-56).

The California Supreme Court impliedly presumed that there are no "nice guys" who would allow members of "the public" to use their vacant property, and expressly refused to recognize that a general license to "the public" would or could knowingly be granted (2 Cal.3d at 41, 84 Cal.Rptr. at 169, 465 P.2d at 57).

2/ It is a bit troublesome to reconcile the conclusions that five years of "use by the public" is presumptive proof of simultaneous acquiescence and adversity.

After five years of such use, the property is dedicated to "the public".

Based on testimony of "public use" half-a-century ago (before Mrs. Daugherty's home was built), the trial court ordered a "public recreation easement" impressed on her entire property - including her home.[3/] To the "nice guys" in the world, confiscation is their reward. The only California beach owners who escaped Gion-Ditez are the misanthropes who fenced "the public" out.

Opinion Below

The opinion of the California Court of Appeal presented for review by this petition is reported as City of Long Beach v. Daugherty (1977) 75 Cal.App.3d 972, _____ Cal.Rptr.____. A copy of the opinion is attached as Appendix A.

3/ On appeal, the City and State requested that the easement be relinquished as to the home itself, and the Court of Appeal did so.

Jurisdiction

The judgment of the California Court of Appeal was filed and entered December 16, 1977. A timely Petition for Rehearing was denied by that Court January 3, 1978. A copy of the order is attached as Appendix B. A timely Petition for Hearing in the California Supreme Court was denied February 9, 1978. A copy of the order is attached as Appendix C. A copy of the Superior Court's Notice of Intended Decision is attached as Appendix D, and its Judgment as Appendix E.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented For Review

1. When a state Supreme Court reverses a long-standing rule of property which sets up the requirements for establishing the prescriptive dedication of private property to public use, and then the courts of that state retroactively apply the new rule in such a manner that property which was private under the old rule, ipso facto, eo instanti, becomes public

under the new rule - without the payment of any compensation to the former owner, and without any opportunity for private property owners to adjust their actions to fulfill the requirements of the new rule - has the former owner been deprived of property without due process of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Can a state, without violating the Fifth and Fourteenth Amendments to the United States Constitution, take private property for public use without compensation, by means of a sudden change in judicially declared property law?

3. Does it violate the contract clause of the United States Constitution (Article 1, §10), for a state supreme court to radically alter property rights and then retroactively apply its new decision to property acquired and protected pursuant to previously-settled law?

4. Is a litigant afforded due process of law when a state court establishes presumptions about the effect of human behavior - which have no basis in fact - which are applied so conclusively that once evidence of that behavior has been introduced, the opponent can do nothing to rebut its impact?

Constitutional Provisions

The following Constitutional provisions are involved in this petition:

U.S. Const., Art. 1, §10, Cl. 1:

"No State shall . . . pass any . . . law impairing the obligation of contracts . . ."

U. S. Const., 5th Amentment:

". . . nor shall private property be taken for public use, without just compensation."

U.S. Const., 14th Amendment:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Since 1922 there has been a home on the 25 foot wide lot now owned by Petitioner Catherine Daugherty. Mrs. Daugherty's tiny lot is located near the easterly end of an eight and half mile long ocean beach in Long Beach, California.

Before 1922, some members of the general public had used part of the eight and a half mile beach for recreation. There was no testimony that anyone used Mrs. Daugherty's 25 foot portion of that eight and a half miles. Mrs. Daugherty's home was constructed in 1922. The home covers approximately 95 feet of the lot's 155 foot depth. The remainder of Mrs. Daugherty's lot, what would normally be called one's front yard, had no fence separating it from the seaward public

beach (just as most people do not fence their front yards).

Before 1922 (indeed, before 1970's Gion-Dietz decision), the law of California was clear from a series of California Supreme Court decisions beginning in 1915 that the fact that the owner of undeveloped beach property failed to object to "public" use was presumed to show that a license had been granted for such use. This licensed use would not result in the prescriptive acquisition or "implied dedication" of the property to the public.

Then in 1970, the California Supreme Court stunned the legal community[4/] with its decision in Gion v. City of Santa Cruz [consolidated with Dietz v. King] (1970) 2 Cal.3d 29. Gion-Dietz turned the law around. Under the new Gion-Dietz rule, five years of "public" use no longer resulted in a presumption of a license, but instead of an intent to dedicate the

---

4/ Commentators referred to it as a "bombshell", and likened its impact on real property law to both an "earthquake" and a "hurricane." (See text accompanying notes 6-7, infra.)

land to the "public."

If Gion-Dietz were applied prospectively only, property owners would have time to adjust their actions to the new rule.

But in the case at bench, the California courts retroactively applied Gion-Dietz. They held that the innocent pre-1922 acts, which were presumed to have been performed under a license from the owner (and thus could not result in the "public's" prescriptive acquisition of rights), were now to be judged by the post-1970 law, which presumes the contrary. The trial court, referring to the Gion-Dietz rule as having been given ". . . judicial birth . . . after an unduly long and substantially unknown and uneventful pregnancy . . . ," remarked:

> "Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed." (Notice of Intended Decision, Appendix D., pp. 8,5.)

The result is that Mrs. Daugherty's property has been taken from her for public use without any compensation, by a sudden and unexpected change in state property law, in violation of Article 1, §10 and the Fifth and Fourteenth Amendments to the United States Constitution. These U.S. Constitutional issues were raised by Mrs. Daugherty in each level of the California Court system. They appear in her Answer to the Complaint and her Cross-Complaint, as well as her Motion for New Trial in the Superior Court, the Appellants' Opening Brief and Petition for Rehearing in the Court of Appeal, and the Petition for Hearing in the Supreme Court. Each court has closed its eyes to these unconstitutional incursions.

VESTED PROPERTY RIGHTS CANNOT - CONSISTENT WITH DUE PROCESS OF LAW - BE SWEPT ASIDE BY SUDDEN CHANGES IN THE LAW THAT (IN THE WORDS OF THE TRIAL JUDGE) "TOOK THE WHOLE [LEGAL] PROFESSION [BY SURPRISE]"

This Court has consistently held that the 14th Amendment prohibits state courts from establishing or changing rules of law relating to vested property rights in such a way that the rights are taken for public use without just compensation. (Muhlker v. New York & Harlem R.R. [1905] 197 U.S. 544, 570-571; Hughes v. Washington [1967] 389 U.S. 290, 296-299 [concurring opinion]; Chicago, B.&Q. R. Co. v. Chicago [1897] 166 U.S. 266, 241.)

Two cases quite similar to the case at bench arose recently in Washington and Hawaii. They show the correct rule. Like the California Supreme Court in Gion-Dietz, the Supreme Courts of Washington and Hawaii were concerned with preserving their shoreline areas for "the public". But federal courts have refused to allow this to be done by confiscatory means.

In the Washington case, the Supreme Court of Washington decided for the first time in 1966 that the Washington Constitution of 1889 vested in the State, title to all accretions to the shore. The Constitution did not expressly say that. In Hughes v. Washington (1967) 389 U.S. 290, this Court - on certiorari to the Washington Supreme Court - held that federal law determined ownership of the accretions, and the owner was Mrs. Hughes, not the State. The concurring opinion of Mr. Justice Stewart illuminates the issue at bench:

> "To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law

thus inevitably presents a federal question for the determination of this Court.

* * *

"There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, preexisting property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property - without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment." (389 U.S. at 296-299.)

In Sotomura v. County of Hawaii (D. Hawaii 1975) 402 F.Supp. 95, Mr. and Mrs. Sotomura owned coastal property with a metes and bounds description on the ocean side, rather than a fluctuating tide line boundary. This had been confirmed by the Hawaii Land Court (402 F.Supp. at 99).

Years later, the Hawaii Supreme Court decided to change the rules applicable to coastal boundaries, and established new presumptions relating to coastal boundaries (see 402 F.Supp. at 99, 100).[5/]

Based on its new presumptions, the Hawaii Supreme Court - at the urging of the County of Hawaii - ordered the seaward boundary of the Sotomura property be moved so as to transform part of the Sotomura property into public property.

The Sotomuras then filed suit in U.S. District Court to restrain the enforcement of the State Supreme Court's decision, because of its retroactive destruction of property rights by definitional sleight-of-hand. The District Court found serious constitutional questions:

5/ Just as the California Supreme Court invoked new presumptions in Gion-Dietz.

". . . it is well established that courts are not immune from the constitutional prohibitions against taking property without just compensation when their unpredictable changes of state law operate to produce such a result. [citations] Here, this court has been called upon to determine, inter alia, whether the application of the Ashford standards to plaintiffs' Land Court property constituted an unpredictable or radical departure from established state law." (402 F.Supp. at 101)

The same principles deserve application here. The California Supreme Court's Gion-Dietz decision was (in the words of Hughes and Sotomura), a sudden, unpredictable and radical departure from established law.

One need hardly go beyond the transcripts herein. As the trial judge himself acknowledged:

"THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for the first time in what? 1971? A rule of law enunciated in this state by the Supreme Court with reference at least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to

that point they were paying valuable money, thought they were doing it because they had to for these very rights." (RT 549)

"Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed." (Notice of Intended Decision, Appendix D, p. 5.)

The practicing bar agrees.

Assistant California Attorney General Jay Shavelson, one of the counsel in Gion-Dietz, called Gion-Dietz ". . . an earthquake of major proportions . . . in California real property law."[6/]

Edward L. Lascher (currently a member of the State Bar's Board of Governors) thought it akin to both a "bombshell" and a "hurricane".[7/]

While student commentators have been somewhat more restrained, they too, echo this thought:

6/ Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? (1972) 47 Cal.St.B.J. 415.

7/ Lascher, Tips For the Overburdened Reader (1971) 46 Cal.St.B.J. 13, 16.

". . . an important extension of the law of implied dedication by adverse use . . ."8/

". . . novel use of doctrine . . ."9/

". . . excessively expanded an already muddled variation of the doctrine of implied dedication." 10/

". . . the legal foundation for this decision is equally obscure." 11/

All of the characterizations are true.

Before Gion-Dietz, the basic law with respect to implied dedication of coastal property was clearly stated in the Supreme

---

8/ Note, The Supreme Court of California 1969-1970 (1971) 59 Calif. L. Rev. 30, 231-232.

9/ Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches (1971) 44 S. Cal. L. Rev. 1092, 1093.

10/ Ibid.

11/ Comment, Public or Private Ownership of Beaches: An Alternative to Implied Dedication (1971) 18 U.C.L.A. L. Rev. 795, 802.

Court's decision in F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436.12/ In Hihn, the City claimed that property (unused by the fee owner) adjoining public beach property, had been dedicated for public recreational purposes because the public had long used the land as if it were public land, and the owners never objected (170 Cal. at 447).13/ The California Supreme Court curtly rebuffed the notion:

> "Where land is uninclosed and uncultivated, the fact that the public has been in the habit of going upon the land will ordinarily be attributable to a license on the part of the owner, rather than to his intent to dedicate. (13 Cyc. 484). This is more particularly true where the user by the public is not over a definite and specified line, but extends over the entire surface of the tract. (13 Cyc. 484). It will not be presumed from mere failure to object, that the owner of such land so used intends to create in the public a right which would

---

12/ Note that Hihn expressed the law at the time the easements at bench were purportedly acquired.

13/ The facts are remarkably similar to Gion and Dietz.

practically destroy his own right to use any part of the property." (170 Cal. at 448) (Emphasis added.)

Hihn was followed by the California Supreme Court in the later beach cases of City of San Diego v. Hall (1919) 180 Cal. 165, 168; Whiteman v. City of San Diego (1920) 184 Cal. 163, 173; and Manhattan Beach v. Cortelyou (1938) 10 Cal. 2d 653, 668.

Until Gion-Dietz, the implied dedication rule had been applied exclusively to roads. (See Note, This Land is My Land: The Doctrine of Implied Dedication and Its Application to California Beaches [1971] 44 S.Cal. L. Rev. 1092, 1099.)

This rationale of the Hihn line of cases was never judicially questioned until Gion-Dietz (see Shepard's California citations).

What happened in Gion-Dietz - as in Hughes and Sotomura - was a drastic redefinition of property rights. That which was private property was declared by the California Supreme Court - under newly issued rules - to have become public.

The rules which everybody thought were the rules before 1970, are no longer the rules. The means by which an ocean-front property owner reasonably believed he could protect his property rights before 1970, were declared insufficient.

But those settled, pre-1970 rules formed the basis of property law before 1970. Those who relied on what the courts - including the California Supreme Court - had said before 1970, should not be placed in the position of having their property confiscated because they could not predict what the Supreme Court would do. To so so is to deprive them of their property without any legal process - much less due process of law. Retroactive application of Gion-Dietz was erroneous and, until now, monstrously prejudicial at to Mrs. Daugherty.[14/]

14/ Ordinarily, such drastic substantive changes are prospectively applied, in order to prevent the kind of unfair result reached at bench. That the Gion-Dietz decision was itself applied in a retroactive fashion was, as this Court has remarked, necessary in order to provide a justiciable controversy. See, e.g. Stovall v. Denno (1967) 388 U.S. 293, 301: (Cont'd.)

GION-DIETZ, BY RADICALLY AND RETROACTIVELY CHANGING THE LAW OF "IMPLIED DEDICATION", UNCONSTITUTIONALLY IMPAIRED THE OBLIGATION OF CONTRACTS, IN CONFLICT WITH DECISIONS OF THIS COURT

When Mrs. Daugherty acquired her home in 1961, the law of California was clear that there could be no "implied dedication of open beach property simply because the owner failed to take action to evict "public" users.

14/ (Cont'd)
"Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying Wade and Gilbert the benefit of today's decisions. Inequity arguably results from according the benefit of a new rule to the parties in the case in which which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making." (Emphasis added.)

Nine years later, in 1970, the California Supreme Court changed all that. In Gion-Dietz, it held that such benign inaction led to a presumption of dedication. That presumption is virtually irrebuttable.15/

In the case at bench, the California courts retroactively applied Gion-Dietz so that random actions of unknown persons half a century before, as well as private inactions at the same time, which would NOT have resulted in an "implied dedication" at the time of their occurrence, had eo instanti transformed Mrs. Daugherty's front yard into a public beach.

Such a radical change in the law, which not only impairs, but destroys, the rights Mrs. Daugherty acquired by her contract of purchase of the property, conflicts with this Court's enforcement of Article 1, §10 of the Constitution.

15/ This case is the proverbial Exhibit A. Once evidence had been introduced of five years of such use, there was nothing Mrs. Daugherty could introduce to change the result. (See the Court of Appeal's decision, Appendix A. p. 5.)

Perhaps the clearest example is Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544. There, by settled New York law, the plaintiff had an easement appurtenant to his property for light, air and view. An elevated railroad was built which obstructed his easement. The lower New York courts - consistent with settled law - awarded him compensation for the damage inflicted by obstruction of his easement. The New York Court of Appeals reversed. This Court refused to permit such confiscation by a sudden change in the law:

"The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power, or the limitations

upon the power, of the courts of New york to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, . . ." (197 U.S. at 570-571.) (Emphasis added.)

The same is true at bench. To redefine rules of property, and then apply them to interests acquired and protected under different rules, is unfair. As in Muhlker, such retroactive application unconstitutionally impairs the obligations of contract.

CONCLUSION

At the conclusion of the difficult proceedings below, the trial judge, as he was about to declare the Daughtery yard, home and bedroom subject to a public

recreation easement, said to Mrs. Daugherty's attorney:

> "THE COURT: I will go along with you. I happen to believe in property rights. I happen to believe in the capitalist system. I am not a Communist, but when rights are taken away from property owners who don't know that they are giving up rights in the course of time, what am I to say? I have no alternative."

Mrs. Daugherty believes that the trial court had an "alternative", one obediant to the United States Constitution. She prays that a writ of certiorari issue, and that the judgment be reversed, so that the primacy of the United States Constitution is preserved.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON
A Professional Corporation

Attorneys for Petitioner

APPENDIX A

[Civ. No. 48399 Second Dist. Div. Four Dec. 16, 1977]

CITY OF LONG BEACH, Plaintiff and Respondent, v. CATHERINE A. DAUGHERTY et al., Defendants and Appellants; STATE OF CALIFORNIA, Defendant and Respondent.

OPINION

KINGSLEY, J. — Defendants Daugherty and Sheehan appeal from a judgment declaring that there exists a public easement for recreational purposes over certain property owned by them. With a modification requested by the city and state, we affirm the judgment.

Defendants own property, in the City of Long Beach, located on the ocean beach of that city. Originally, the state's answer sought to determine the boundary between the city-owned submerged tideland and the property of the defendants. During the course of the trial, the parties entered into agreements fixing the seaward boundary of their properties at what is commonly known as the

"Chapter 138 line."[1/] The trial court found that the entire property of the defendants' shoreward of that line, including improved portions thereof, to be subject to an easement in favor of the public. At the motion for new trial and here the city and state waived and abandoned any claim to an easement over the improved portions of the property. In accordance with that present position, we modify the judgment as hereinafter provided.

The properties herein involved are located on a sandy beach in the City of Long Beach, lying between Ocean Boulevard and the Pacific Ocean. In the past, the shoreline was eroded and half or more of the properties were covered by water. In 1954, the city began to make sand

---

1/ As recited in the judgment, the "Chapter 138 line, refers to that certain line described in section 7 of Chapter 138, Statutes of 1964, 1st Extraordinary Session, a survey map which was recorded March 11, 1968, as Document No. 1498 in Book M-2796, Page 449, Official Records in the office of the County Recorder of Los Angeles County and filed therein as No. F-1267."

fills to alleviate the erosion and the city spent more than $2 million to stabilize the beach. Sandfill was placed on the seaward 38 feet for the Sheehan lot and the seaward 64 feet of the Daugherty property.

The court found the public had made continuous use of the properties for 60 years. The public used the beach for hunting, fishing, swimming, shell collecting, ball playing, picnicking, without asking permission from the owners. The public used the "entire" beach as if it were a public beach. Captain Miller, a lifeguard from 1922 to 1966, was asked whether the public used "the areas in front of the houses on the beach," and he responded, "All of the time." He said, "Regardless of where the house was, they laid in front of the house, spread their blankets out and that was their place."

The city put up a restroom in the vicinity of the beach, there were lifeguard services, and between 250 to 350

people a day used the beach[2/] during the period between 1924 and 1935. Beginning in 1924, the city maintained the beach by cleaning and grading, including maintaining the area in front of the houses, and between the houses, and the owners were aware of the city's maintenance.

The subject properties are between Granada Avenue on the west and 55th place on the east. The city caused a series of sandfills on the subject property from 1945 to 1960. These sandfills widened the beach so that it extended approximately 500 feet southerly or seaward of the Chapter 138 line. On the Sheehan parcel, the fill extended northerly to within 95 feet of Ocean Boulevard and on the Daugherty parcel, the fill extended northerly to cover the seaward 64 feet of the property. The fill was paid for by public funds and later out of tideland trust revenue. Part of the Sheehan property and Daugherty property is improved.

2/ The record on this point appears to refer to the entire beach and not the defendants' property alone.

Appellants' photographs showed no one on the beach near the subject properties on beach-type holidays such as Labor Day and the Fourth of July. (Some homes had signs which said, "Private Property - Permission to Pass Revocable at any Time.") However, there is no citation in the long record as to which homes had the signs and at what dates the signs were up.

The trial court found the recreational easements were dedicated before 1922 and the trial court concluded the Mansell case (City of Long Beach v. Mansell (1970) 3 Cal.3d 462 [91 Cal.Rptr. 23, 476 P.2d 423]) established only fee title and boundaries and did not preclude the finding of a public recreational easement. The lower court relied on Gion v. City of Santa Cruz (1970) 2 Cal. 3d 29 [84 Cal.Rptr. 162, 465 P.2d 50], which held that use by the public for the prescriptive period without asking or receiving permission from the fee owner resulted in implied dedication of a recreational easement to the public.

I

One of the issues in the case at bench, as stated by appellants, is whether the subject beachfront properties were impliedly dedicated to public use under Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, or whether that implied dedication was precluded by the decision in City of Long Beach v. Mansell, supra, 3 Cal.3d 462, which fixed the boundaries of specific properties in the case at bench.

Appellants' first argument is that the judgment below undermined the Mansell decision which had settled the boundaries of the land in question and also had settled matters of title in the land. As a reading of the opinion in that case discloses, Mansell was a proceeding to validate an agreement, entered into between the city and various property owners, seeking to settle long-standing and complicated disputes over the tidelands in Alamitos Bay. The agreements involved purported to settle the boundary line between the tidelands that were the property of the city as

transferee from the state and the upland areas, adjoining those tidelands, which were thereby recognized as the private property of the upland owners. The lands herein involved were among those involved in those agreements and in that decision. Nothing in the agreements or the decision is directed to the existence of any easements over any of the land therein involved. Nor was there any need, in view of the purpose of the agreements involved, to consider any issue as to easements. Ownership of an easement has no necessary relationship to ownership of a fee title. An easement is defined as an interest in the land of another which entitled the owner of the easement to a limited use or enjoyment of the servient tenement. (See Eastman v. Piper (1924) 68 Cal.App. 554 [229 P. 1002].) Nothing in the agreements involved in Mansell, or in that decision, relates to or affects the existence of a recreational easement in the lands therein involved.[3/]

3/ The quitclaim deeds involved in Mansell, and the deeds given to effect that decision expressly involve only

(continued)

II

Appellants argue that the case at bar is distinguishable from Gion v. City of Santa Cruz, supra, and Dietz v. King (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50], in both matters of policy and on its facts. Appellants also point to legal articles suggesting that the decision of Gion and Dietz should not be expanded beyond their facts and should not be applied to the facts at bar.

First, appellants point out that there are means of access to the public beach in question other than access by going over the subject properties, whereas in Gion and Dietz, which were bounded by the high tideline, there were no means of access beyond the public tidelands. However, it does not appear from Gion-Dietz that the public is entitled to a recreational easement only in situations where that easement is the only means of access. Gion-Dietz is not so limited.

3/ (continued)
"sovereign" rights: they are expressly limited to such rights and do not apply to claims of easement in the public.

The Supreme Court in the Gion-Dietz cases considered matters of governmental maintenance of the land and public use of the land and not merely the question of whether there were other means of access to the beach.

Appellants argue that there were no structures maintained by the owners on the disputed property in Gion or in Dietz, whereas appellants have structures on their land. Since, because of the abandonment above discussed, the particular portions of the Sheehan and Daugherty properties that are now the subject of this appeal are not improved, this argument does not aid appellants' position.

Because the case at bench, in light of the modification sought by the city and state, does not involve any claim to property over which a public easement may have existed in the past but which, without opposition by any public body, has later been improved or fenced, we need not, and do not, consider the effect of such a succession of events on a present claim to an easement.

Appellants argue that, in Gion, the property owners did not object to public use, and the appellants in the case at bar claim they did ask people to leave. There is no showing that appellants' predecessors in title asked people to leave, and, although the testimony is conflicting, there is a great deal of evidence to show that people were not asked to leave, and that no significant efforts were made to get the public to leave. Mrs. Sheehan merely asked people to leave when they were "rowdy" and Mrs. Daugherty said no one was ever on her land. "If the owner has not attempted to halt public use in a significant way, however, it will be held as a matter of law that he intended to dedicate the property or an easement to the public, and evidence that the public used the property for the prescriptive period is sufficient to establish dedication." (Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, 41.)

Appellants argue that in Gion-Dietz the use by the public was current but in the case at bar, the usage was not current.

There is some testimony in the case at bar to the effect that the public usage was current and there was some testimony concerning current cleaning and maintenance by the city.

Appellants argue that, in Gion-Dietz, the public rightly believed that the property was public, but that the public could not have held such a belief in the case at bar, because the parcels in question were improved with houses. That is a misreading of the opinion in those cases. Their holding is that it is the intention of the property owner that controls and, as stated in the quotation above given from Gion, the existence of an intention to dedicate may be inferred, as a matter of law, from long acquiescence.

Appellants argue that the court will not presume that owners of the property today knowingly permit the general public to use their land. However, the court has not made such a presumption. It was only after the taking of evidence that the court found a recreational easement, and that finding was based on public use

of the beach, and maintenance of the beach by governmental entities.

Appellants argue that a Gion-Dietz easement is not created unless members of the public used the property believing that the public had a right to use it asserting that a finding on belief is essential. (Gion v. City of Santa Cruz, supra, 2 Cal.3d 29, 39.) In Gion, the court said that what must be shown is that "[the] persons used the property believing the public had a right to such use." However, the Gion court also said: "Litigants . . . seeking to show that land has been dedicated to the public need only produce evidence showing that persons have used the land as they would have used public land." There is nothing in the language of Gion to suggest that a specific finding on a public's "rightful belief" is essential.

III

Appellants argue that the court findings were not supported by substantial evidence. Appellants argue that there was insufficient evidence to show

substantial use by diverse members of the general public using the property for at least five years. We do not agree. Captain Miller, the lifeguard captain who was in charge of the beach from 1922 to 1966, testified that, from 1924, the public used the whole beach for recreational purposes including the area in front of the houses.

People who used the beach did not ask permission from the homeowners and the property owners rarely objected to the use although they were aware of the public's use. The lifeguards raked the whole length of the beach, including the area up to and in front of and between the houses, and the property owners were aware that the city was cleaning the beach. Several residents of the area also testified to public use of the beach immediately in front of the houses; and that the use was without permission from the homeowners and without objection. A resident of the area also testified to public use of the beach between the houses in order to get to the water. Public employees testified that they

cleaned the beach going as close as one or two feet of any house. Photographs of the sand in front of the property show heavy use indicated by many foot-prints in the sand.

Thus, there is substantial evidence to show public maintenance of the beach and public use of the beach since and before 1924, continuing on for many years beyond the necessary period.

Appellants rely on County of Orange v. Chandler-Sherman Corp. (1976) 54 Cal.App. 3d 561, 566 [126 Cal.Rptr. 765], to show that use must be substantial rather than casual usage for the court to find a recreational easement. That case is not here applicable since the evidence and the findings show much more than casual usage by small numbers of the public.

Appellants complain that evidence on public use of the beach in the case at bar was not specifically directed to use of the beach in front of the particular subject parcels. It is true that some of the city's evidence applied to the beach as a whole rather than to the specific area in question. However, the trial

court could properly infer from that testimony, which referred to the beach as a whole, that the evidence related to and included the subject properties. In addition to the testimony about the beach as a whole, there was specific testimony concerning use of the beach by the public in front of appellants' houses and between the houses.

IV

Appellants argue that it is unfair to apply Gion "retroactively." Appellants appear to argue that it is unfair to apply Gion to facts that existed prior to the Gion decision. But, in Gion itself, the facts existed prior to any decision finding an implied dediction in the particular situation that existed before that court. Therefore, the argument is without merit.

The judgment in superior court case No. SO-C-23517 (Sheehan) is modified as follows:

Delete in their entirety paragraphs 1 and 2 of said judgment and substitute therefor the following language:

"1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across a portion only of the subject parcel of real property, all as more particularly hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

"An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:

"The westerly 25 feet of Lot 7 in Block 44 of the Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State

of California, as per map recorded in Book 4 pages 75 and 76 of Maps in the office of the County Recorder of said County. Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 7 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said westerly 25 feet of Lot 7 and its prolongation southerly to the Chapter 138 Line.

"EXCEPT that portion of the westerly 25 feet of Lot 7 lying northerly of a line parallel to and located southerly 123.50 feet, measured at right angles, from the southerly line of Ocean Boulevard, a public street, which public street abuts said lot on its northerly side.

"*As used herein the Chapter 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449. Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

"Title to the northerly 123.50 feet referred to in the exception to the description set forth immediately hereinabove was not and is not now subject to or encumbered by any easement for public recreational purposes in, over, upon and across all or any portion thereof.

"2. That the defendant Genevieve Sheehan, as owner of the underlying fee title in and to the subject parcel of real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof, and said defendant has no right to build, use, occupy or maintain any permanent structures, buildings or improvements on or over said easement area, or any part thereof, or otherwise make any use of said westerly 25 feet of Lot 7 or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement."

The judgment in superior court case No. SO-C-23518 (Daugherty) is modified as follows:

Delete in their entirety paragraphs 1 and 2 of said judgment and substitute therefor the following language:

"1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across a portion only of the subject parcel of real property, all as more particularly hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

"An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:

"Lot 3 in Block 51 of Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4 pages 75 and 76 of Maps, in the office of the County Recorder of said County. Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line.

"EXCEPT that portion of Lot 3 lying northerly of a line parallel to and located southerly 95 feet, measured at right angels, from the southerly line of Ocean Boulevard, a public street, which public street abuts said lot on its northerly side.

"*As used herein the Chpater 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449. Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

"Title to the northerly 95 feet referred to in the exception to the description set forth immediately hereinabove was not and is not now subject to or encumbered by any easement for public recreational purposes in, over, upon and across all or any portion thereof.

"2. That the defendant Catherine A. Daugherty, as the owner of the underlying fee title in and to the subject parcel or real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof, and said defendant has no right to build, use, occupy or maintain any permanent structures, buildings or improvements on or over said easement area, or any part thereof, or otherwise make any use of said Lot 3 or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement."

As so modified, the judgments are affirmed. The city shall recover its costs on appeal.

Files, P.J., and Jefferson (Bernard), J., concurred.

APPENDIX B

Los Angeles, Cal. JAN 3- 1978

TITLE (City of Long Beach) / (Daugherty, et al) No. 48399

The Court:

PETITION FOR REHEARING DENIED.

Clay Robbins, Clerk

APPENDIX C

CLERK'S OFFICE, SUPREME COURT

4250 State Building
San Francisco, California 94102

FEB 9 1978

I have this day filed Order _____

HEARING DENIED

In re: 2 Civ. No. 48399

City of Long Beach

vs.

Daugherty

Respectfully,

G.E. BISHEL
Clerk

C-1.

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

CITY OF LONG BEACH,

Plaintiff,

vs.

MULLINEX, et al.,

Defendants.

No. So C 23513

NOTICE OF INTENDED DECISION

The following memorandum may be deemed a notice of intended decision and will serve in its own way as a guide for the preparation of findings of fact and conclusions of law. (The manifest disjointedness of the comments contained hereinafter is dictated by the necessity for avoiding a more prolix statement and, in a measure, constitute the Court's reactions to the various arguments as they appear in the memoranda submitted to the Court by respective counsel."

It is urged upon the Court that there has been no showing of five years of use immediately prior to the filing of suit which would justify the granting of any easement in this matter. If this legal

proposition were valid, manifestly, the plaintiff must go hence with nothing. Each of these parcels, at least to the extent of the perimeters of their structures, plus enclosures, have not been so used by the public for recreational purposes during any part of the five years prior to suit. However, the argument or contention that the crucial period is that five-year period immeidately prior to suit has no merit. It would be countervailing to what was said in Gion, ("nothing can be done by the present owners to take back that which was previously given away"), and it has been held elsewhere that even laches by the governmental entity cannot rob the public for which it acts as a trustee, of the benefit of the easement; nor is it necessary to establish or recognize at least one of the easements sought to be established here, that is, the recreational easement, that the City must show it did anything at all by way of protecting the properties or in administering them in furtherance of the recreational easement. Conversely, when that is

shown to be present, it supplies additional evidence that the easement was existent and recognized.

Gion did not turn on the volume or nature of services performed on the land by the City, although consideration was there given to that factor--the thrust of the decision springs from the public user for recreational purposes.

Reference has been made to the self-help of the landowners to protect their homes and to restore them after storms, and this likewise does not militate against the existence of the easement according to the previously mentioned quotation from Gion.

To separate and distinguish the subject properties from the entire 8-1/2 miles of beach shoreline is unnecessary. The use of all 8-1/2 miles, these parcels included, for recreational purposes impresses the easement on all 8-1/2 miles, these parcels included. The more popular use of the westerly shoreline, as against the easterly area and beaches which include the parcels at bench, does not

dissipate the recreational character and use of these parcels now in litigation. The testimony received indicates sporatic use, seasonal from the very nature of the type of easement, to-wit, picnicing, bathing, clamming, etc., and no limitation as to persons to whom the beach was available for these purposes when the occasion and season called for it. True, there has been evidence of more substantial use in other portions, but no criterion has been set up by the Gion case as to volume of use.

The focus of our consideration must be, according to Gion, whether these parcels in fact were used--more or less--for such purposes for the requisite period of time. In effect, Gion is saying that the used beaches belong to the people for recreational purposes. (By "used," we refer, of course, to the five year limitation necessary for creation thereof.)

The City's "recognition" of "rights of individual owners" by placing its installations on city-owned property or beyond the Chapter 138 line (failing to

place even one trash can on the property of the defendants), does not destroy the easement it now seeks to have judicially impressed on those properties. The City is a trustee for the public recreational-easement users, as well as a governmental body performing specific functions which can be carried out with a minimal imposition on property owners and without abandoning the trust of the easement or the substantive rights of the "public". Gion suggests that once recreational easement has been established, neither the property owners nor the public entity involved--city, county or town--can do anything to destroy it or abandon it--nor does diminishing use, as distinguished from increasing use, have such effect.

Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed. Can we then point to any conduct prior to that decision, viz., building permits, zoning, city installations beyond the parcel boundaries, etc.,

as affecting an abandonment? Implicit in the concept of abandonment is an intelligible choice of conduct, that is, conduct with some knowledge of the underlying rights. If this is true, how can we say the City (assuming it was so empowered to do) must be deemed to have "abandoned" easements it didn't even know existed? Even cities can't be chargeable with such prescience.

By the same token, Gion answers a contention made by defendants herein that non-use of the easement for the prescriptive period by reason of the erection of homes on the servient land extinguish the easement, for Gion states the acts of the servient tenement owner cannot destroy or extinguish the public recreational easement. McCormick is not apropo, for there the court was dealing with individually owned easements and not a public recreational easement as in Gion. In any event, Gion having emanated from the Supreme Court has overriding authority, being a later and higher source to which every knee must bend.

Mansell dealt with legal titles of the parcels herein involved, among others, but defendants fail to distinguish that the present focus of the City's litigation is limited to easements and does not extend to the legal title of the underlying servient tenements, nor is any claim now made thereto--so estoppel, under Mansell and the execution of the agreements under the authority of the enabling act and the force of that opinion, is not available to resist plaintiff's claim. Estoppel involves a change of position or reliance on conduct, etc., which would otherwise work an injustice. While there may be an underlying "injustice to the landowners", it does not spring from the sources noted. The clarification and settlement of boundary and title questions could not militate against the present assertion of this public easement.

In the narrow context of this case the affirmative defenses of laches, adverse possession and statutes of limitation cannot be applied against the "public-use". Estoppel is not to be

applied, for plainly, and only lately, long after acts of the City relied on as a basis for estoppel occurred, did we even learn of the judicial birth of this public-use easement, after an unduly long and substantially unknown and uneventful pregnancy. One of the elements and possibly the most significant of estoppel is an "awareness" by the party to be estopped in the true facts and this City, no more than Santa Cruz before Gion in 1970, was not aware or apprised of the existence of the easement which was then suddenly born full-grown.

The contention made by defendants that defendants had no right to grant or deny permission to the public to use the tidelands and that plaintiff has not proved otherwise begs the question completely. The thrust of Gion is in reverse, that is, that public users thereof somehow extracted from defendants ownership and carved out a public-users easement, not only of former tidelands, but of the uplands so used as well.

Insofar as "dedication" is based on a voluntary act, as defendants contend,

it is irrelevant to Gion's imposition of the easement, willy-nilly the landowner. These arguments would be better made (and undoubtedly were made without success) to the Gion court and not to this tribunal, which is compelled to follow Gion by the mandate of office--even if it were to agree with the propriety of the contention here made.

Insofar as the erection of houses may constitute an expression of intent negativing dedication by defendants, there are al least two answers there too, viz., such erection took place after the period fixed for creation of the public easement and the property owner having once dedicated cannot "withdraw" such dedication.

The posting of signs here did not occur until after that public use had ripened into an easement.

The City of Long Beach, as a governmental entity, cannot surrender, by quitclaim deed or otherwise, the recreational easement here existent. It's possessory rights are not all-inclusive of the public's rights, as we read Gion, nor is the City's alleged motivation in

this law suit, as suggested by defendants, a consideration for denying the application to have the easement judicially declared. If the easement existed, it continues--regardless of such motivation (as to which no finding is here made for that reason).

To label the land anything other than beach land is to really bury one's head in the sands thereof. The only change is not one of character, but of size.

The evidence of erosion control in this record indicates the public entities individually or jointly, cooperatively engaged in such activity over various periods of time at public expense, all in preservation and furtherance of the public recreational easement. We suspect that defendants' argument that the court should reject the claimed erosion control easement would be prejudicial even to defendants' ownership interest saddled with or free of the claimed recreational easement. Be that as it may, it has not been adequately shown that any of the uplands here involved for any required period of time, to-wit, five years, have been

subjected to erosion control measures sufficient to create an easement on such uplands (by uplands herein we refer, of course, to the parcels north of the 138 line). There hasn't been demonstrated by a preponderance of evidence that any of such erosion control measures were in fact carried on in any part of the uplands. For that reason, the claim to an erosion control easement must be rejected. Parenthetically, there is credible testimony to the effect, in any event, that it's hardly deemed necessary to have such easement when we consider the present size of the beach area south of the 138 line, and the facility with which the plaintiff can operate for appropriate erosion control activity in that area south of such line.

The evidence herein is insufficient to support a finding that any defendant (or predecessor in title) granted a license to the public to use his property or that any defendant made a bona fide attempt to prevent public use before the easement was ripened into existence by the passage of five years. The signs

pictured in evidence are witnesses to the contrary for at least a period subsequent to the birth of the recreational easement.

As Gion states, the law is that the landowner "intended" dedication to public use and the record does support this finding of such use for the prescriptive period herein. True, this evidence from the nature of the case and the antiquity of the events, is not overwhelming, but is of sufficient substantiality to impress an impartial tribunal.

Counsel for the City should prepare, serve and file with the Clerk of this Department findings, conclusions and prepare judgment in accordance with the foregoing.

DATED: 8/1, 1974.

MAX Z. WISOT
JUDGE OF THE SUPERIOR COURT

APPENDIX E

LEONARD PUTNAM, City Attorney
CLEMONS C. TURNER, Deputy City Attorney

Attorneys for Plaintiff

Suite 600 City Hall
Long Beach, California 90802

Telephone: 436-9041

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF LONG BEACH, a municipal corporation,	)	No. SOC 23518
Plaintiff,	)	JUDGMENT QUIETING TITLE TO REAL PROPERTY
vs.	)	
CATHERINE A. DAUGHERTY, et al.,	)	
Defendants.	)	

Upon the findings of fact and conclusions of law on file herein, and good cause appearing therefor, it is ORDERED, ADJUDGED AND DECREED:

1. That at the time of the commencement of this action, title to an easement for recreational purposes in, over, upon and across the subject parcel of real property, all as more particularly

hereinafter in this paragraph described, was and now is vested in the City of Long Beach, a municipal corporation, as owner in fee of said easement, for itself and on behalf of the public generally. Said easement is described as follows:

> An easement in, over, upon and across the parcel of real property hereinafter described for public recreation purposes, and public uses incidental thereto, including but not limited to parking, picnicking, sunbathing, swimming, surfing, strolling, fishing, boating, playing sports, general viewing, access to the beach and the Pacific Ocean, public protection and policing and maintenance, to wit:
>
> Lot 3 in Block 51 of Resubdivision of Part of Alamitos Bay Townsite, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4 pages 75 and 76 of Maps, in the office of the

> County Recorder of said County, Said parcel shall be deemed to be bounded on its southerly or seaward side by the Chapter 138 Line*, on its westerly side by the westerly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line and on its easterly side by the easterly line of said Lot 3 and its prolongation southerly to the Chapter 138 Line.

2. That the defendant Catherine A. Daugherty, as the owner of the underlying fee title in and to the subject parcel of real property, has no estate, right, title, lien or interest whatsoever in or to said easement, or in any part thereof,

---

* As used herein the Chapter 138 Line refers to that certain line described in Section 7 of Chapter 138, California Statutes of 1964, 1st Extraordinary Session, Survey Map of which was recorded March 11, 1968 as Document No. 1498 in Book M-2796 Page 449, Official Records, in the office of the County Recorder of said Los Angeles County and filed therein as No. F-2167.

and said defendant has no right to build, use, occupy or maintain any permanent structure, buildings or improvements on said subject real property, or any part thereof, or otherwise make any use of said property or any part thereof which would in any way unreasonably interfere with the above described rights of plaintiff and the public under said easement.

3. That said title of the plaintiff, City of Long Beach, in and to the public recreation easement as more particularly described hereinabove in paragraph 1 be and the same is hereby forever quieted against any and all claims of the defendant Catherine A. Daugherty and said defendant is perpetually enjoined and restrained from setting up or making any claim to or upon the public recreation easement above referred to and described.

4. That at the time of the commencement of this action, title to certain tide and submerged lands as more particularly hereinafter in this paragraph described was and now is vested in the City of Long Beach, a municipal corporation,

as owner in fee simple absolute, as trustee, under and by virtue of the provisions of Chapter 676, Statutes of 1911; Chapter 102, Statutes of 1925; and Chapter 158, Statutes of 1935, all as amended and supplemented. Said real property is described as follows:

> All that real property adjacent to and lying southerly or seaward of the subject parcel of real property as described in paragraph 1 hereinabove.

5. That except as a member of the public generally, the defendant Catherine A. Daugherty has no estate, right, title, lien or interest whatsoever in or to said tide and submerged lands, or in or to any part thereof.

6. That said title of plaintiff, City of Long Beach, as trustee, in and to the tide and submerged lands as more particularly described hereinabove in paragraph 4, and each and every part thereof, be and the same is hereby forever quieted against any and all claims of the defendant Catherine A. Daugherty and said defendant is perpetually

enjoined and restrained from setting up or making any claim to or upon said tide and submerged lands, or any part thereof.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED:

7. That plaintiff shall recover from the defendant Catherine A. Daugherty its costs and disbursements as herein incurred in the amount of $_____; provided, however, that no costs shall be recovered against the defendant State of California.

DATED: 1/13/75

/s/ Max Z. Wisot
JUDGE OF THE SUPERIOR COURT

In the Supreme Court of the United States

Supreme Court, U. S.
FILED
JUN 6 19
MICHAEL RODAK, JR., CLERK

October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

v.

CITY OF LONG BEACH, CALIFORNIA, a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

77-1603

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

EVELLE J. YOUNGER, Attorney General
of the State of California
N. GREGORY TAYLOR,
Assistant Attorney General
KATHERINE E. STONE,
Deputy Attorney General
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2272

Attorneys for Respondent State of California, acting by and through its State Lands Commission

ROBERT W. PARKIN, City Attorney,
City of Long Beach
CLEMONS C. TURNER,
Deputy City Attorney,
333 West Ocean Boulevard
Long Beach, California 90802
Telephone: (213) 590-6061

Attorneys for Respondent City of Long Beach

Westside Law Publishers Santa Monica, California 213/451-1714

TOPICAL INDEX

Page

Question Presented 1
Statement of the Case 2

Argument

I

The Gion Case Did Not Change The Law Respecting Dedication By Public User In California 4
- A. Introduction 4
- B. Dedication in English and American Law Dates From the 18th Century 4
- C. California Law of Dedication Dates From the Early Days of Statehood 7
- D. The Gion Case Followed These Numerous Precedents 8
- E. Petition Is Not Justified in Relying on the Hihn Case 11
- F. The Application of California's Long-Standing Doctrine of Implied Dedication by the Courts Below Did Not Effect a Taking of Vested Property Rights 14

II

The "Impairment of Contracts" Clause of The U.S. Constitution Is Only Directed Toward State Legislative Action, Not Court Decisions 15
Conclusion 18

TABLE OF AUTHORITIES CITED

Cases	Page
Abbot Kinney Co. v. City of Los Angeles (1959) Cal.2d 52, 346 P.2d 385	10
Barclay v. Howell (1832) 31 U.S. (6 Pet.) 498	5
Barrows v. Jackson (1953) 346 U.S. 249, rehg. den. 346 U.S. 841	15-16
Bateman v. Bluck (1852) 118 Eng. Rep. 329	5
Chicago & Alton R.R. v. Tranbarger (1915) 238 U.S. 67	16
Cinncinnati V. White (1832) 31 U.S. (6 Pet.) 431	6
City of Laguna Beach v. Consolidated Mortg. Co. (1945) 68 Cal. App.2d 38, 155 P.2d 844	12
City of Long Beach v. Daugherty (1977) 75 Cal. App.3d 972, 142 CAl. Rptr. 593	2, 3, 12, 15
City of San Francisco v. Scott (1854) 4 Cal. 114	7
Cleveland & Pittsburg R.R. Co. v. Cleveland 235 U.S. 50 (1914)	16
Freeman v. Bellegarde (1895) 108 Cal. 179, 41 P. 289	10
Gion v. City of Santa Cruz (1970) 2 Cal.3d 29, 84 Cal. Rptr. 162	3, 4, 6, 7, 8, 9, 11, 12, 14, 15, 16, 18
Hartley v. Vermillion (1903) 141 Cal. 339, 74 P.987	7, 8
F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 150 P. 62	11, 12, 13, 15
Hughes v. Washington (1967) 389 U.S. 290	13
Kimball v. MacPherson (1873) 46 Cal. 103	10
Kryger v. Wilson (1916) 242 U.S. 171	16

Lade v. Shepherd (K.B. 1735) 93 Eng. Rep. 997	5
Long Beach Land & Water Co. v. Richardson (1886) 206, 11 P. 695	10
McConnell v. Lexington (1827) 25 U.S. (12 Wheat.) 582	5
McCoy v. Union Elevated R.R. Co. (1918) 247 U.S. 354	16
Morse v. Miller (1954) 128 Cal. App.2d 237, 275 P.2d 545	9
Morse v. E.A. Robey & Co. (1963) 214 Cal. App.2d 464, 29 Cal. Rptr. 734	9
Muhlker v. New York and Harlem R.R. Co. (1905) 197 U.S. 544	16, 17
New Orlens v. United States (1836) 35 U.S. (10 Pet.) 662	6
O'Banion v. Borba (1948) 32 Cal.2d 145, 195 P.2d.10	11
People v. California Fish Co. (1913) 166 Cal. 576, 138 P. 79	10
People v. Sayig (1951) 101 Cal. App.2d 890, 226 P.2d 702	12
Poole v. Huskinson Ex. 1843 11 M. & W. 827	5
Regina v. Broke (Nisi Prius 1859) 1 F. & F. 514	5
Regina v. East Mark (1848) 116 Eng. Rep. 701	5
Rex v. Barr (K.B. 1814) 4 Camp. 16	5
Rex v. Hudson (K.B. 1732) 93 Eng. Rep. 935	4
Rex v. Lloyd (K.B. 1808) 1 Camp. 262	5, 6
E.A. Robey & Co. v. City Title Ins. Co. 261 Cal. App.2d 517, 68 Cal. Rptr. 38	9
Ross v. Oregon (1913) 227 U.S. 150	16
Rugby Charity v. Merryweather (K.B. 1790) 103 Eng. Rep. 1049	5
Schwerdtle v. Placer County (1895) 108 Cal. 589, 41 P. 448	7, 8, 9, 14

Sotomura v. County of Hawaii (D. Hawaii 1975) 402 F. Supp. 95 13
Tidal Oil Co. v. Flanagan (1923) 263 U.S. 444 16
Union Transportation Co. v. Sacramento (1954) 42 Cal.2d 235, 267 P.2d 10 ..... 8, 9
Upham v. Hosking (1882) 62 Cal. 250 10
Valentine v. City of Boston (1839) 39 Mass. (22 Pick.) 75 7
Vernon v. Vestry of St. James, Westminister (1880) 16 Ch. D. 457 5
Washington Blvd. Beach Co. v. City of Los Angeles (1940) 38 Cal. App.2d 135, 100 P.2d 828 9

Statutes

California Civil Code § 830 10
California Fish and Game Code, § 6511 10
California Government Code, §§ 39933-39937 10
California Government Code §§ 54090-54093 10
California Public Resources Code, § 6008 10
California Resources Code, § 6210.4 10
California Public Resources Code, § 6323 10

Constitutions

United States Constitution
Article I, § 10 15
Fifth Amendment 18
Fourteenth Amendment 18
California Constitution
Article I, § 25 10
Article X, § 4 [formerly Article XV, § 2] 9

Journals

Comment, California Beach Access: the Mexican Law and the Public Trust, 2 Ecol. L.Q. 571 (1972) 9

In the Supreme Court of the United States

October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

v.

CITY OF LONG BEACH, CALIFORNIA, a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

QUESTION PRESENTED

Is a question presented for this Court's review where, applying California's long-standing rule regarding public rights in real property arising as a result of the doctrine of implied dedication, the lower courts found such rights to exist in the subject unimproved beach property, based upon evidence of 60 years of continued public use of said

property for recreational purposes without permission being asked or received, and without significant interference or objection to such use from the fee owner, and upon evidence of 45 years of public maintenance of that beach, at great public expense, with full knowledge of the fee owner?

STATEMENT OF THE CASE

The opinion below *only* concerns the seaward portion of petitioner's lot which has always been a part of an open and unimproved sandy beach in what is now and for many years has been highly populated urban area of Southern California. (*City of Long Beach v. Daugherty* (1977) 75 Cal.App.3d 972, 142 Cal.Rptr. 593).[1]

The State court's holding that the public has acquired a prescriptive easement to continue to use this beach land for recreational purposes does not depend upon any presumption. "It was only after the taking of evidence that the court found a recreational easement. . ." (75 Cal. App.3d at 978.) The decision is firmly based on substantial evidence showing 60 years of continuous public use of the beach (75 Cal. App.3d at 979) and 45 years of maintenance by the City of Long Beach (75 Cal. App.3d at 979).

Indeed, the evidence indicates that but for the efforts of the City to control the severe erosion of this beach, the property would have been washed away. Sandfill was

---

[1]On appeal, the City and the State waived and abandoned any claim to a public recreational easement over that portion of the Daugherty property improved at the time of trial. The opinion below modified and affirmed the judgment accordingly. (75 Cal.App.3d at 981-983.)

placed on all of the subject property at great public expense. Prior to 1945-46 the beach at and in the vicinity of the Daugherty property suffered from severe erosion and as a result was very narrow. The ocean tides, from time to time, covered up to 60% of the seaward portion of the Daugherty lot including all of the property here in question. After 1945-46, the City expended over two million dollars in public funds in an effort to control erosion and to protect the beach from washing away. Sandfill was placed on the seaward 64 feet of the Daugherty property, including all of the property here in question. The beach at this point was thus widened by sandfill by some 500 feet; no private moneys were contributed to the cost of beach stabilization. (75 Cal. App.3d at 975.)

When petitioner purchased the property in 1961 the public had been accustomed to using this beach land for ". . . fishing, swimming, shell collecting, ball-playing and picnicking . . ." for more than 50 years. (75 Cal. App.3d at 975). The public use is current as well as of long duration. (75 Cal. App.3d at 975.) Under these circumstances, it is unreasonable for petitioner to expect to exclude the public today. This is the reasoning underlying the law of implied dedication by public user set forth in *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, [84 Cal. Rptr. 162], and applied in the opinion below.

The rule of law derives from a long-declared constitutional, statutory and judicial policy favoring public use of California's beaches and rests on clearly expressed judicial precedent in California dating back to the early days of statehood. Respondents submit that this rule of law does not violate any provision of the United States Constitution and as applied to the opinion below does not present a question for review by this court.

ARGUMENT

I

THE GION CASE DID NOT CHANGE THE LAW RESPECTING DEDICATION BY PUBLIC USER IN CALIFORNIA

A. Introduction.

In *Gion v. City of Santa Cruz* (1970) 2 Cal.3d 29, [84 Cal. Rptr. 162][2] the California Supreme Court held there was sufficient evidence to establish an implied-in-law dedication of a recreational easement over coastal properties where the public had used the beach as if it were a public recreational area for more than five years without asking or receiving permission and without significant objection or interference from the fee owners. (2 Cal.3d at 43.) The court noted that evidence of governmental maintenance of the land is significant in establishing implied dedication to the public. (2 Cal.3d at 43-44.)

As will be demonstrated below, the decision logically follows a long judicial precedent in the common law, and is consistent with long declared constitutional, statutory, and judicial policy in California.

B. Dedication in English and American Common Law Dates From the 18th Century.

Dedication was first reported in English cases dating back to the 18th Century. See *Rex v. Hudson* (K.B. 1732)

---

[2]The *Gion* case was consolidated with *Dietz v. King* in the State Supreme Court.

93 Eng.Rep. 935; *Lade v. Shepherd* (K.B. 1735) 93 Eng.Rep. 997; *Rugby Charity v. Merryweather* (K.B. 1790) 103 Eng.Rep. 1049.

The doctrine was reiterated and developed in many subsequent cases[3] and carried over intact into the American common law. In 1827 this Court upheld the doctrine in a case involving a spring, which had always been used by the public as if it were public. Chief Justice Marshall specified the factors behind the Court's decision:

> ". . . The reasonableness of reserving a public use; the concurrent opinion of all the settlers, that it was so reserved; the universal admission of all, that it was never understood, that the spring lot was drawn by any person; the early appropriation of it to public purposes; the fact that James McConnell actually claimed a different lot, added to the length of time which has been permitted to elapse, without any assertion of title to this lot, are, we think, decisive against the appellant." (*McConnell v. Lexington* (1827) 25 U.S. (12 Wheat.) 582, 586.)

In 1832, this Court decided *Barclay v. Howell* (1832) 31 U.S. (6 Pet.) 498, affirming a dedication of access over riverfront land. Factors this Court considered to support the dedication included the lapse of time in the alleged owner's claim, the public use during the period and the need of the public for access. The court indicated that "six

---

[3]*Rex v. Lloyd* (K.B. 1808) 1 Camp.262; *Rex v. Barr* (K.B. 1814) 4 Camp. 16; *Poole v. Huskinson* (Ex. 1843) 11 M. & W. 827; *Regina v. East Mark* (1848) 116 Eng.Rep. 701; *Bateman v. Bluck* (1852) 118 Eng.Rep. 329; *Regina v. Broke* (Nisi Prius 1859) 1 F. & F. 514; *Vernon v. Vestry of St. James, Westminster* (1880) 16 Ch.D. 457.

or seven years" (rather than thirty) had been sufficient evidence of dedication in some cases (31 U.S. at 512).

In *Cincinnati v. White* (1832) 31 U.S. (6 Pet.) 431, this Court expressed the concept of dedication *implied in law* that the California Supreme Court relied on in *Gion.* As the Court discussed it in *Cincinnati:*

> "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for public purposes intended by the appropriation. This was the doctrine in the case of *Jarvis v. Dean*, already referred to, with respect to a street; and the same rule must apply to all public dedications; and *from the mere use of the land, as public land, thus appropriated, the assent of the owner may be presumed.* In the present case there having been an actual dedication, fully proved, a continued assent will be presumed, until a dissent is shown; and this should be satisfactorily established by the party claiming against the dedication. In the case of *Rex v. Lloyd,* 1 Camp. 262, Lord Ellenborough says, if the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, *he shall be presumed to have dedicated it to the public."* (31 U.S. (6 Pet.) at 440.) (Emphasis added.)

The *Cincinnati* case was discussed and approved in *New Orleans v. United States* (1836) 35 U.S. (10 Pet.) 662, again in relation to waterfront property. Many other

cases in state courts have come to the same conclusion, that long-standing public user gives rise to a dedication implied in law. (*See, e.g. Valentine v. City of Boston* (1839) 39 Mass. (22 Pick.) 75.)

It is submitted that the expression of this principle by the California Supreme Court 138 years later in *Gion* is not a "drastic redefinition" of the law, as petitioner claims. (Pet. Br. at 20.)

C. California Law of Dedication Dates From the Early Days of Statehood.

Numerous California cases have treated the principle of implied dedication, but perhaps its earliest recognition came in *City of San Francisco v. Scott* (1854) 4 Cal. 114. In that case the length of public use, four to five months, was deemed too short to give rise to a dedication. (4 Cal. at 117.) However, the Court named three ways in which a dedication could arise: (1) by deed or overt act of the landowner (*express* dedication); (2) by presumption from long-continued public use (dedication *implied in law;* (3) by presumption from the acquiescence of the landowner in the public use (dedication *implied in fact*).

As to dedication implied in law, the court said that no specified length of use established the presumption. (4 Cal. at 116.) It was later held that public use must endure for the period of limitations to recover real property. (*See, Hartley v. Vermillion* (1903) 141 Cal. 339, 348-349, [74 P. 987].)

In 1895 the California Supreme Court clearly stated the law of implied dedication in *Schwerdtle v. Placer County,* 108 Cal. 589, [41 P. 448]. The public had used the landowner's property for some thirty-seven years, from

which the trial court ruled that a dedication had occurred as a matter of law. The California Supreme Court affirmed, holding that adverse use for the five-year period of limitations established a conclusive presumption of assent in the dedication, and negated any claim that the use was under a license. (108 Cal. at 593, 596.)

The Court reaffirmed its opinion in 1903 in *Hartley v. Vermillion, supra,* 141 Cal. 339, holding that public use without objection of the landowner negates any asserted presumption of permission or license. (141 Cal. at 349.)

In *Union Transportation Co. v. Sacramento* (1954) 42 Cal.2d 235 [267 P.2d 10], the California Supreme Court reiterated the law developed in the *Schwerdtle* and *Hartley* cases, and in particular, noted the distinction between dedications implied in *law* and dedications implied in *fact.* Dedications implied in fact occur when a property owner long acquiesces in public use under circumstances negating the idea of use by license. (42 Cal.2d at 240). In contrast, dedications implied in law occur when the public has used the property for more than five years with full knowledge of the owner, without receiving permission and without objection being made by anyone. When these elements exist, the Court held, "a conclusive presumption of dedication arises." (42 Cal.2d at 240.)

D. The Gion Case Followed These Numerous Precedents.

It was in tune with the over 200 years of development of the principle of implied-in-law dedication that the California Supreme Court decided *Gion v. City of Santa Cruz, supra,* 2 Cal.3d 29.

Reviewing the cases,[4] particularly *Schwerdtle v. Placer Co., supra,* 108 Cal. 589 and *Union Transportation Co. v. Sacramento, supra,* 42 Cal.2d 235, the *Gion* court explained and clarified the doctrine of implied dedication.

The Court first noted the distinction between implied-in-fact and implied-in-law dedications, then clearly explained that under the implied-in-law principle, all that is necessary is that the public use the property for the five-year period of limitations without permission or significant interference or objection from the fee owner. This in itself is "adverse use." There is no presumption that public use of beach lands is permissive. Whether the use was permissive or under a license is a question of fact. (*Gion v. City of Santa Cruz, supra,* 2 Cal.2d at 40-41.)

Applying these principles to the beaches in that case, the court recounted the long history of California's policy encouraging public use of and access to the shore. This tradition of public access, which dates back to pre- and early-Statehood days,[5] was firmly fixed in the California Constitution of 1879 in Article XV, Section 2 (now Art. X, § 4):

---

[4]The Court cited ample precedent for dedication of beaches and stated, "In this state, for instance, the public has gained rights, through dedication . . . in beaches (see, e.g., *Washington Blvd. Beach Co. v. City of Los Angeles, supra,* 38 Cal.App. 2d 135; *Morse v. Miller, supra,* 128 Cal.App.2d 237; *Morse v. E.A. Robey Co.* (1963) 214 Cal.App.2d 464 [29 Cal.Rptr. 734]; *E.A. Robey & Co. v. City Title Ins. Co., supra,* 261 Cal.App.2d 517)." (2 Cal.3d at 42.)

---

[5]See Comment, *California Beach Access: The Mexican Law and the Public Trust,* 2 Ecol.L.Q. 571 (1972).

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water."

The intent of this constitutional mandate was expressed in numerous state statutes and court decisions, the court pointed out.[6]

---

[6]"Among the statutory provisions favoring public ownership of shoreline areas is Civil Code, section 830. That section states that absent specific language to the contrary, private ownership of uplands ends at the high-water mark. The decisions of this court have interpreted this provision to create a presumption in favor of public ownership of land between high and low tide. (See Kimball v. MacPherson (1873) 46 Cal. 103, 108; Upham v. Hosking (1882) 62 Cal. 250, 258; Long Beach Land & Water Co. v. Richardson (1886) 70 Cal. 206, 209, 11 P. 695; Freeman v. Bellegarde (1895) 108 Cal. 179, 185, 41 P. 289; People v. California Fish Co. (1913) 166 Cal. 576, 591-596, 138 P. 79: Abbot Kinney Co. v. City of Los Angeles (1959) 53 Cal.2d 52, 57, 346 P.2d 385.)

". . . .

"Other legislative enactments that indicate the strong public policy in favor of according public access to the coast include: (1) Article I section 25 of the California Constitution (guaranteeing the right to fish); (2) Government Code, sections 54090-54093 (relating to discrimination in beach access); (3) Government Code, sections 39933-39937 (implementing Cal.Const. Art. XV, § 2, and requiring municipalities to maintain access to navigable waters); (4) Fish and Game Code, section 6511 and Public Resources Code, section 6008 (restrictions on sales and leases of public lands in Humboldt Bay in order to preserve public access); (5) Public Resources Code, section 6210.4 (requiring the state to reserve convenient access to navigable waters in connection with the sale or other disposition of shoreline lands); and (6) Public Resources Code, section 6323 (forbidding

E. Petitioner Is Not Justified in Relying on the Hihn Case.

Petitioner makes much of the case of *F. A. Hihn Co. v. City of Santa Cruz*, (1915) 170 Cal. 436, [150 P. 62]. Yet that case did not, as petitioner contends, express accurately the law of implied dedication. Four reasons negate the *Hihn* case's value as precedent.

First, the paragraph quoted as supporting a presumption that a license is given to the public who use open beach land[7] is pure dictum. The California Supreme Court opened that paragraph thus:

> "Whether the facts shown establish dedication of the land to the public use for pleasure grounds is a question that might be dismissed with the simple statement that *the answer did not set up a dedication and that the finding in this regard was outside of the issues.*" (170 Cal. at 447.) (Emphasis added.)

Second, as the *Gion* court pointed out, any confusion engendered by the *Hihn* dictum would have been clearly erased by the 1948 decision in *O'Banion v. Borba* (1948) 32 Cal.2d 145, [195 P.2d 10].[8]

---

structures on artificially accreted lands so that such accretions will remain an unobstructed and open beach)." (2 Cal.3d at 42-43.)

---

[7]Pet. Br. at 19-20.

---

[8]The *Gion court quoted O'Banion* thus:

> " 'The preferable view is to treat the case the same as any other, that is, the issue is ordinarily one of fact, giving consideration to all the circumstances and the inferences

Third, the decision in *Hihn* was not on point, being a case of dedication implied in *fact*, rather than implied in *law*. It thus is not relevant as to latter situations. The additional cases cited by petitioner also suffer from the same defect.

Finally, as observed by the court below, "It was only after the taking of evidence that the court found a recreational easement, and that finding was based on public use of the beach, and maintenance of the beach by governmental entities." (*City of Long Beach v. Daugherty, supra*, 75 Cal.App.3d at 978.)

It must be noted that the trial court said that:

> "The evidence herein is insufficient to support a finding that any defendant (or predecessor in title) granted a license to the public to use his property or that any defendant made a bona fide

---

that may be drawn therefrom. The use may be such that the trier of fact is justified in inferring an adverse claim and user and imputing constructive knowledge thereof to the owner. There seems to be no apparent reason for discussing the matter from the standpoint of presumptions.' (32 Cal.2d at 148-149.)" (2 Cal.3d at 40-41.)

Overlooked by the *Gion* court and by petitioner herein was a line of cases holding that public use is presumed adverse and not permissive. In an implied dedication case in 1951, a California court said:

> "There is a general presumption that use by other than the owner is adverse and not permissive. While this presumption is not as strong when the land is open and uncultivated and remote, as when it is enclosed, cultivated and developed [citing *Hihn*, inter alia,] the presumption exists in either case." (*People v. Sayig* (1951) 101 Cal.App.2d 890, 897 [226 P.2d 702].) (*Cf. City of Laguna Beach v. Consolidated Mortg. Co.* (1945) 68 Cal.App.2d 38, 44-47, [155 P.2d 844].)

> attempt to prevent public use before the easement was ripened into existence by the passage of five years. *The [no trespassing] signs pictured in evidence are witnesses to the contrary* for at least a period subsequent to the birth of the recreational easement." (Pet. Br., App. D. 11-12.) (Emphasis added.)

Thus petitioner herein would not have been helped by any presumption that the use was by license, because such a presumption would have been rebutted by the evidence.

That petitioner must rely on a paragraph of dictum from the *Hihn* case, while completely ignoring the long line of cases supporting the *Gion* decision, and the opinion below, is obvious testimony to the weakness of her case.

Also inapposite to the case at bar are the two federal decisions cited by petitioner, *Hughes v. Washington* (1967) 389 U.S. 290, and *Sotomura v. County of Hawaii* (D. Hawaii 1975) 402 F.Supp. 95. The *Hughes* case dealt with the question "whether federal or state law controls the ownership of accreted land gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to Statehood." (*Hughes v. Washington, supra*, 389 U.S. at 290-91.) The case thus revolved around a federal/state conflict of laws issue, with which Mr. Justice Stewart's concurring opinion was not directly concerned.

The *Sotomura* case dealt with an actual change in the boundary lines of the plaintiffs' land, which had been previously decided in the Land Court. The District Court held that the plaintiffs should have been afforded an opportunity to present evidence against fixing the seaward boundary of their property at the vegetation line. (*Soto-*

mura v. Count of Hawaii, supra, 402 F.Supp. at 99.) Petitioner herein was not prevented from presenting evidence in the trial court. As noted above, her evidence was not only insufficient, but it even contradicted the idea that the use was under a license.

F. The Application of California's Long-Standing Doctrine of Implied Dedication by the Courts Below Did Not Effect a Taking of Vested Property Rights.

Rather than being a "drastic redefinition" of the California law of implied dedication, as petitioner contends, the *Gion* decision was a careful restatement and clarification of law that had long existed.

As detailed above, the *Gion* court rested its opinion squarely on the California Constitution (written in 1879), statutes going back many years, and court decisions reaching back at least to the 1890's (e.g., *Schwerdtle v. Placer County, supra,* 108 Cal. 589).[9] In applying this impressive history of statutory and judicial precedent to the facts, the *Gion* court was careful to stay within the bounds of the federal Constitution:

> "Although article XV, section 2 may be limited to some extent by the United States Constitution it clearly indicates that we should encourage public use of shoreline areas whenever that can be done consistently with the federal Constitution." (*Gion v. City of Santa Cruz, supra,* 2 Cal.3d at 43.)

It was with this careful approach to balancing state and federal law, private property rights and public access

[9]As noted above, the doctrine goes back to 1854 in California, p. 7, *supra.*

rights, that the California Supreme Court came to its judicious conclusion in *Gion.*

It therefore appears farfetched for petitioner, who only purchased the property in 1961, to argue that she somehow relied on a paragraph of dictum from the 1915 *Hihn* case, in contrast to the reality of over a century of precedent for the *Gion* holding. Moreover, the facts in this case are even weightier than the *Gion* facts. Here the subject property was existent chiefly owing to the City's expenditure of over $2 million on maintenance and erosion control. (*City of Long Beach v. Daugherty, supra,* 75 Cal.App.3d at 975.) In addition, the beach has been continuously used for over 60 years as if it were a public recreational area. (75 Cal.App.3d at 975.)

In short, the decision in *Gion* and its application to the beach property in the present case effected no "taking" of vested property rights.

II

THE "IMPAIRMENT OF CONTRACTS" CLAUSE OF THE U.S. CONSTITUTION IS ONLY DIRECTED TOWARD STATE LEGISLATIVE ACTION, NOT COURT DECISIONS.

Petitioner's claim that the *Gion* decision effected a "retroactive" change in the law is wrong, as discussed in Point I, *supra.*

But even when a change *is* made in the law by a judicial desicion, such change is not in violation of the "impairment of contracts" clause, United States Constitution, Article I, section 10. Numerous decisions of this Court have stated this simple rule of law, e.g., *Barrows v.*

Jackson (1953) 346 U.S. 249, rehg. den. 346 U.S. 841; *McCoy v. Union Elevated R.R. Co.* (1918) 247 U.S. 354; *Kryger v. Wilson* (1916) 242 U.S. 171; *Cleveland & Pittsburg R.R. Co. v. Cleveland* (1914) 235 U.S. 50. In *Barrows* this Court dealt with the issue succinctly:

> "It is contended by petitoners that for California courts to refuse to enforce this covenant is to impair the obligation of their contracts. Article I, § 10, of the Federal Constitution provides: 'No State shall. . . pass any. . . Law impairing the Obligation of Contracts. . . .' The short answer to this contention is that this provision, as its terms indicate, is directed against *legislative action* only.
>
> " 'It has been settled by a long line of decisions, that the provisions of § 10, Article I, of the Federal Constitution, protecting the obligation of contracts against state action, is directed only against impairment by legislation and not by judgments of courts. . . .' *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 451." (*Barrows v. Jackson, supra*, 346 U.S. at 260.) (Emphasis added.)

In light of this clear statement, the assertion by petitioner that a judicial decision in *Gion* or the case below impaired a contract[10] is totally devoid of merit.

---

[10]The only case cited by petitioner for this point, *Muhlker v. New York and Harlem R.R. Co.* (1905) 197 U.S. 544, has been consistently distinguished on the basis that a *statute* had been passed subsequent to the contract involved in that case. (*See, e.g., Tidal Oil Co. v. Flanagan* (1923) 263 U.S. 444; *Chicago & Alton R.R. v. Tranbarger* (1915) 238 U.S. 67; *Ross v. Oregon* (1913) 227 U.S. 150.) In *Tidal Oil Co. v. Flanagan*, for example, this Court made it clear that "In such a case [referring to the *Muhlker* case] this Court accepts the meaning put upon the impairing statute by the state court as authoritative, but it is the *statute* as enforced by the State through its courts which impairs the contract, not the judgment of the court." (263 U.S. 444, 453). (Emphasis added.)

CONCLUSION

The Court below correctly applied the California law of implied dedication, which was reaffirmed and clarified in *Gion v. City of Santa Cruz, supra,* 2 Cal.3d 29. As the expression of long-existing California law, that doctrine did not operate retroactively on the beach property of petitioner. Hence, its application did not violate the Fifth or Fourteenth Amendment to the United States Constitution.

Further, as a judicial decision, the application of the doctrine did not violate the "impairment of contracts" clause, falling wholly outside the scope of that clause.

Therefore, petitioner's argument has no merit as a Constitutional question, and should not be entertained by this Court. For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
of the State of California
N. GREGORY TAYLOR,
Assistant Attorney General
KATHERINE E. STONE,
Deputy Attorney General

*Attorneys for Respondent
State of California, acting
by and through its State
Lands Commission*

ROBERT W. PARKIN, City Attorney,
City of Long Beach
CLEMONS C. TURNER,
Deputy City Attorney,

*Attorneys for Respondent
City of Long Beach*

Supreme Court, U. S.
FILED
JUN 14 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF., a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
INTRODUCTION	1
HOW CAN LONG BEACH AND THE STATE CONTEND WITH A STRAIGHT FACE THAT GION-DIETZ WAS NOT A REVOLUTIONARY DECISION?	2
THE SUGGESTION BY LONG BEACH AND THE STATE THAT CALIFORNIANS SHOULD HAVE IGNORED FOUR DECISIONS OF THE CALIFORNIA SUPREME COURT IS HARD TO FATHOM	7
IF LEGISLATIVE ACTION IS NECESSARY FOR AN IMPAIRMENT OF CONTRACTS CLAIM, IT IS PRESENT AT BENCH	12
CONCLUSION	16

TABLE OF AUTHORITIES

Cases

Adams v. Seaman (1890)
82 Cal. 636 — 8

City of San Diego v. Hall (1919)
180 Cal. 165, 179 Pac. 889 — 7, 9

Gion v. City of Santa Cruz (1970)
2 Cal.3d 29, 84 Cal.Rptr. 162
465 P.2d 50 — Passim

F.A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436,
150 Pac. 62 — 7-12, 14

Manhattan Beach v. Cortelyou (1938)
10 Cal.2d 653, 76 P.2d 483 — 8, 9

Muhlker v. New York & Harlem R.R.
(1905) 197 U.S. 544 — 12, 15

O'Banion v. Borba (1948)
32 Cal.2d 146 — 9, 10

Whiteman v. City of San Diego
(1920) 184 Cal. 163,
193 Pac. 98 — 7, 9

Statutes

California Government Code

§ 54090 — 13

§ 54092 — 13

Texts

Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? (1972)
47 Cal. St. B. J. 414, 415-416 — 4

Constitution

United States Constitution
Article I, §10 — 12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF., a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

PETITIONER'S REPLY BRIEF

INTRODUCTION

The brief filed jointly by Long Beach and the State of California refuses to come to grips with the central issue in this case: the unconstitutionality of suddenly and drastically altering rules of property, and then retroactively applying the rules so as to confiscate private property for public use without the payment of any compensation, and without the possibility of a hearing which comports with due process.

This Court's assistance is needed to

correct a massive injustice to hundreds or thousands of property owners in California. If not halted, this unfairness is likely to be followed by other states because of the lure of getting "something for nothing." The stability of property ownership is threatened - and that threat endangers the stability of government itself. California's recent experience with Proposition 13, was caused as much by adverse reaction to a multitude of government games played with property owners (the Gion-Dietz decision, the Coastal Commission, zoning rollbacks, building moratoria) as it was by property taxes.

HOW CAN LONG BEACH AND THE STATE CONTEND WITH A STRAIGHT FACE THAT GION-DIETZ WAS NOT A REVOLUTIONARY DECISION?

The one thing about this case that one would have assumed to be stipulated is that Gion-Dietz worked a radical change in the law.

The trial court thought so:

> "THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for

> the first time in what? 1971? A rule of law enunciated in this state by the Supreme Court with reference at least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to that point they were paying valuable money, thought they were doing it because they had to for these very rights." [RT 549]

So did the late Assistant Attorney General of California, Jay Shavelson, who headed the Attorney General's office in charge of property matters. Mr. Shavelson, who - before his death - was one of the counsel in Gion-Dietz, had this to say:

> "In February of 1970, an earthquake of major proportions occurred in California real property law. Its tremors have been felt by the Legislature, the bar, private landowners, the land title industry, and the public at large.
>
> "This was the celebrated consolidated action of Gion v. City of Santa Cruz and Dietz v. King.
>
> * * *
>
> "The importance of the case lies in the fact that the Court expressly repudiated the presumption of earlier decisions that public use of unenclosed and uncultivated land was attributable

to a license on the part of the owner, rather than his intent to dedicate. This was said to be particularly true where the user extended over an entire tract, rather than a definite and specified line, so that dedication would practically destroy the value of the property to the owner himself.[3]

"3 Manhattan Beach v. Cortelyou, 10 Cal.2d 653 (1938); Whiteman v. City of San Diego, 184 Cal. 163 (1920); City of San Diego v. Hall, 180 Cal. 165 (1919); F.A. Hihn Co. v. City of Santa Cruz, 170 Cal. 436, 448 (1915)."

(Shavelson, Gion v. City of Santa Cruz: Where Do We Go From Here? [1972] 47 Cal. St. B. J. 414, 415-416)

The law review staff members from the University of California, UCLA and the University of Southern California, who wrote the analyses quoted at page 18 of the Petition, likewise thought Gion-Dietz radically changed the law.

And yet, in their brief in this Court, Long Beach and the State now urge that Gion-Dietz said nothing new.

This City/State position would seem to call for one of the following conclusions:

• The City and State may be wrong. But if they are wrong - and Gion-Dietz was revolutionary - then it should not have been retroactively applied to events that were governed by different law. Such retroactivity would result in a denial of due process of law (see Pet. 12-21).

• On the other hand, what is the consequence if the City and State are correct, and Gion-Dietz merely reiterated settled law? Then the City and State are barred by laches, estoppel and/or the statute of limitations, from pursuing their claim. The express reason for the trial court's rejection of these defenses was that it would not be fair to penalize the public by insisting that the City and State should have filed this suit before Gion-Dietz, because Gion-Dietz was a radical change in the law. As the trial court expressed it:

> "THE COURT: Before you leave that, if I can interrupt, instead of rehashing it at some later time, we had for the first time in what? 1971? A rule of law enunciated in this state, by the Supreme Court with reference at

least to recreational easements, took the whole [legal] profession [by surprise], admittedly, and even the City Attorney prosecuting this case, because up to that point they were paying valuable money, thought they were doing it because they had to for these very rights.

"Can you now urge laches against someone, an entity who didn't know the law, didn't know it had rights and couldn't avail itself of such rights? Is that a proper argument to bring or proper defense in this posture?" (RT 549 549)

"Here we are concerned that a Gion recreational easement was established in the public prior to 1922. By the same token, before the Gion decision was announced recently (1970), no one knew it existed. Can we then point to any conduct prior to that decision, viz., building permits, zoning, city installations beyond the parcel boundaries, etc., as affecting an abandonment? Implicit in the concept of abandonment is an intellibigle choice of conduct, that is, conduct with some knowledge of the underlying rights. If this is true, how can we say the City (assuming it was so empowered to do) must be deemed to have 'abandoned' easements it didn't even know existed? Even cities can't be chargeable with such prescience." (Appendix D. pp. 5-6)

Mrs. Daugherty believes that Gion-Dietz did radically change the law. But if Long Beach and the State are correct, then reversal is called for because of the inexcusable delay by Long Beach and the State in pursuing remedies under "long-settled" law. Long Beach and the State can't have it both ways.

THE SUGGESTION BY LONG BEACH AND THE STATE THAT CALIFORNIANS SHOULD HAVE IGNORED FOUR DECISIONS OF THE CALIFORNIA SUPREME COURT IS HARD TO FATHOM

In her Petition, Mrs. Daugherty noted that, before Gion-Dietz, the California Supreme Court created a line of authority which held that undeveloped, unfenced land (particularly, a beach) could not be held to be impliedly dedicated under circumstances like those at bench:

F. A. Hihn Co. v. City of Santa Cruz (1915) 170 Cal. 436, 150 Pac. 62;

City of San Diego v. Hall (1919) 180 Cal. 165, 179 Pac. 889;

Whiteman v. City of San Diego (1920) 184 Cal. 163, 193 Pac. 98;

Mahnattan Beach v. Cortelyou (1938)
10 Cal.2d 653, 76 P.2d 483.

These cases were decided during the time the easements at bench were purportedly being acquired.

The City/State response? These cases should have been ignored! In their words:

> "Petitioner is not justified in relying on the Hihn Case." (Br. in Opp., p. 11)

The arguments made by Long Beach and the State fail to sustain this startling proposition.

First, they assert, the language in Hihn relied on by Mrs. Daugherty is ". . . pure dictum." (Br. in Opp., p. 11) There are two responses:

- The California Supreme Court's rule on the use of "dictum" was probably best expressed in Adams v. Seaman (1890) 82 Cal. 636, 638-639. In response to a charge that some of its language in an earlier case was unnecessary to the

decision, the Court said:

> "This is true; but as the point appears to have been quite elaborately considered, and as the opinion was concurred in by the whole court in Bank, what was said is entitled to great weight, if it be not taken as authority in the strict sense . . ."

- In any event, assuming, arguendo, that it was dictum in Hihn, the same language was adopted as the holding in Hall, Whiteman and Cortelyou. The City/State brief ignores those cases.

Second, they say - according to Gion-Dietz - any ". . . confusion . . ." caused by Hihn[1/] was cleared up in O'Banion v. Borba (1948) 32 Cal.2d 146 (Br. in Opp., p. 11). But, as noted in the Petition (p. 20), and not denied by Long Beach and the State, no one was aware of any alteration

---

1/ Confusion seems to be in the eye of the beholder. Hihn was not confusing. Nor were Hall, Whiteman and Cortelyou, each of which expressly followed Hihn.

in the Hihn line until Gion-Dietz. Indeed, the O'Banion case could not have cleared up any Hihn-caused ". . . confusion . . .", as O'Banion never ever mentions Hihn or any of its progeny. Until Gion-Dietz, there was no judicial pronouncement that the rule established in Hihn was no longer alive and well.

Third, they say that Hihn involved dedication implied in fact, while this case involves dedication implied in law (Br. in Opp., p. 12). However, a reading of Hihn makes it clear that the Supreme Court was discussing both types of dedication. Furthermore, the Supreme Court's decisions in Hall, Whiteman and Cortelyou involved dedication implied in law as well as in fact.

Finally, they disingenuously assert that Hihn is of no relevance anyway, because this case was tried on the merits, and the trial court found that an easement had been dedicated (Br. in Opp., pp. 12-13). The flaw in that position is

that under Hihn and its progeny, the evidence in this case would not have established the "implied dedication" of a "recreation" easement.

By contrast, under Gion-Dietz, the trial court held that a showing of some use of some part of the eight and a half mile beach in the general vicinity of Mrs. Daugherty's 25 foot wide lot, was sufficient to establish a fictionally "implied intent" by Mrs. Daugherty's predecessors to "dedicate" this tiny parcel to the public. Hihn would never have contenanced that. Mere use of the beach by the public was insufficient to establish a "dedication" under Hihn.

IF LEGISLATIVE ACTION IS NECESSARY FOR AN IMPAIRMENT OF CONTRACTS CLAIM, IT IS PRESENT AT BENCH

As noted in the Petition, California law - at least since the 1915 Hihn decision - assured Mrs. Daugherty that when she executed her land purchase contract in 1961, the property she bought was really hers. It could not have been "impliedly dedicated" by any previous actions of the "public".

Under this Court's decision in Muhlker v. New York & Harlem R.R. (1905) 197 U.S. 544, when Gion-Dietz overturned the Hihn line of cases, Mrs. Daugherty's contract rights were unlawfully impaired.

The City/State position is intriguing. They say that some statute must be involved before Article I, §10 of the United States Constitution may be invoked.

This position is intriguing, because the City/State brief - in order to bolster the Gion-Dietz decision - relies on statutes which undermine the Hihn decision (see Br. in Opp., p. 10, fn. 6).

Thus, if the existence and enforcement of a state statute is necessary, state statutes are present. For example, two of the statutes relied on by the City/State brief (as well as the Gion-Dietz court) are:

California Government Code § 54090:

"As used in this article 'public beach' means any beach area used for recreational purposes which is owned, operated or controlled by the State, any state agency or any local agency."

California Government Code § 54092:

"Any city, county or other local agency which allows any property owned, operated or controlled by it to be used as a means of access to any public beach shall allow free access over such property to all persons regardless of color, race, religion, ancestry, sex, national origin or residence."

It was the enactment of statutes such as these which Long Beach and the State contend formed the justification for Gion-Dietz.

The above-cited statutes were enacted in 1963, after Mrs. Daugherty purchased her home.

Thus, if impairment of contracts requires

legislative action, then legislative action is present. The enforcement of those statutes in Gion-Dietz, by the overruling of Hihn, impaired the obligation of Mrs. Daugherty's land purchase contract. The statute in Muhlker was little more than those quoted above. It merely authorized an existing railroad to be elevated above street level. The New York courts took that occasion to reverse a long-standing line of cases concerning property rights of owners abutting public streets. Likewise, here, the California Supreme Court siezed upon the above statutes as justification for discarding Hihn.

Frankly, however, Mrs. Daugherty suggests that it would make more sense to enforce the substance of Muhlker - which examined the impact on real people of a sudden change in property law - rather than search for a statute lurking in a corner. To be sure, a statute existed in Muhlker. So does one here. But this Court's words in Muhlker represent a sensitivity to the needs and rights of people that merits preservation without the use of such a crutch:

"The new principle based upon the public interest destroys all distinction between the surface of the soil of a street and the space above the surface, and, seemingly, leaves remaining no vital remnant of the doctrine of the Elevated Railroad Cases. However, we need not go farther than the present case demands. When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.

"And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of state decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the Elevated Railroad Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, . . ." (Muhlker, 197 U.S. at 570-571.) (Emphasis added.)

CONCLUSION

The unfairness done below is of Constitutional magnitude.

Rules of property were altered and applied in such a way that rights acquired and protected under the old rule were confiscated under the new one. Property owners were given no opportunity to adjust their actions to the new rule. Their property was simply declared, ipso facto, eo instanti, to be "public". Due process rebels at the thought.

Mrs. Daugherty prays that the Petition be granted.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON
A Professional Corporation

Attorneys for Petitioner

Supreme Court, U. S.
FILED
JUN 26 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF., a municipal corporation, and STATE OF CALIFORNIA,

Respondents.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1977
No. 77-1603

CATHERINE A. DAUGHERTY,
Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,
Respondents.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF

JERROLD A. FADEM
MICHAEL M. BERGER
of FADEM, BERGER & NORTON
A Professional Corporation

501 Santa Monica Boulevard
Suite 600
P. O. Box 2148
Santa Monica, CA 90406
(213) 451-9951

Attorneys for Petitioner

TABLE OF AUTHORITIES

Case	Page
Robinson v. Ariyoshi (D. Haw. 1977) 441 F.Supp. 559	1-4

Rule	
Supreme Court Rules	
Rule 24[5]	1

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1603

CATHERINE A. DAUGHERTY,

Petitioner,

vs.

CITY OF LONG BEACH, CALIF.,
a municipal corporation, and
STATE OF CALIFORNIA,

Respondents.

SUPPLEMENT TO PETITIONER'S REPLY BRIEF

The Petitioner, Catherine Daugherty, files this brief pursuant to Rule 24[5], Supreme Court Rules, to bring to the Court's attention a decision not available at the filing of her last brief.

The case is Robinson v. Ariyoshi (D.Haw. 1977) 441 F.Supp. 559.

Robinson involves water rights. Under settled state law, the Robinsons had vested rights to "surplus waters".

These rights were supported by ". . . decision after decision . . ." of the Hawaii Supreme Court (441 F.Supp. at 583).[1]

Then, suddenly, the Hawaii Supreme Court reversed its course. The formerly private water rights were declared to belong to the State:

> "McBryde I therefore came as a shocking, violent deviation from the solidly established case law - totally unexpected and impossible to have been anticipated. It was a radical departure from prior decisions." [2]

The U.S. District Court refused to permit such a transformation of private rights into public rights without compensation:

1/ Just as the rights at bench were supported by decision after decision of the California Supreme Court (Pet. at 20-21).

2/ For similar comments about the California rule at bench, see Pet. at 16-18, Petitioner's Reply at 2-6.

> "It is axiomatic that the law of real property is left to the states to develop and administer. Hawaii, like every other state, may by its legislature or its courts make changes in its real property laws, including laws governing property rights of riparian land owners in and to the use of waters flowing along their lands. Underlying the right of the courts and legislature to make changes in the law, however, is the concomitant obligation of the State to compensate those whose property may have been taken over by the State by those changes. Chicago, Burlington &c. R'D v. Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L. Ed. 979 (1897). Even by legislative fiat, property cannot be expropriated and taken over by the State without compensating the private owner for his lost rights. No more can private property be so taken away by judicial decision and handed over, gratis, to the State. 'The touchstone of due process is the protection of the individual against arbitrary action of the government.' Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935."
>
> (441 F.Supp. at 584-585)

Regardless of the public-spirited motivation of the Hawaii Supreme Court to secure these water rights for "the

people", the District Court held that such a public-to-private transformation cannot be effectuated without compensation:

> "This retroactive taking of private property for and by the State, without payment therefore, was clearly the result of 'perverse reading of prior law' as inferentially condemned in O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26, 37 S.Ct. 7, 61 L.Ed. 123 (1916), and in contravention of the principles laid down in Muhlker v. New York & Harlem R.R., 197 U.S. 544, 25 S. Ct. 522, 49 L.Ed. 872 (1905). Even though the court may have been motivated to act because the justices thought it was for the best interest of Hawaii that suplus water be publicly owned and that the rivers should flow, undiminished, to the sea, the court could not and cannot take away the private property of the plaintiffs without paying them for it. The Fourteenth Amendment so commands."
>
> (441 F.Supp. at 586)

That this Fourteenth Amendment protection is for the people of all the states, is what Mrs. Daugherty needs this Court to say.

Mrs. Daugherty prays that a writ issue.

Respectfully submitted,

JERROLD A. FADEM
MICHAEL M. BERGER
FADEM, BERGER & NORTON
A Professional Corporation

Attorneys for Petitioner